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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 365

CANTON COMPANY OF BALTIMORE,
Appellant,

v.

COMPTROLLER OF THE TREASURY,
RETAIL SALES TAX DIVISION,
STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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COMPTROLLER OF THE TREASURY,
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STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Maryland, the highest court of that State, entered on April 11, 1963. No motion for reargument has been filed in the Court of Appeals of Maryland. The judgment of April 11, 1963, affirmed an order of the Baltimore City Court, which, in turn, modified and affirmed an order of the Comptroller of the Treasury of the State of Maryland denying Appellant's petition for abatement of an assessment under the Maryland Retail Sales Tax Act. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 231 Md. 294 and 190 A. 2d 92. The opinion of the Baltimore City Court and the opinion of the Comptroller of the Treasury of the State of Maryland have not been reported. Copies of the opinion of the Court of Appeals of Maryland, which includes that court's judgment, of the opinion and order of the Baltimore City Court, and of the opinion of the Comptroller of the Treasury are attached hereto as Appendix A.

JURISDICTION

1. This action was brought under Article 81, Section 352 of the Annotated Code of Maryland (1957 edition) to appeal from and to obtain revision and abatement of a final determination of the Comptroller of the Treasury of the State of Maryland. The decision of the Baltimore City Court modifying and affirming the determination of the Comptroller was given on June 19, 1962, and an order in conformity therewith was entered on June 26, 1962. The decision of the Court of Appeals of Maryland affirming the judgment of the Baltimore City Court was filed on April 11, 1963. Prior to the filing of the Notice of Appeal herein, in accordance with the Maryland Rules of Procedure, the record was returned to the Baltimore City Court. Notice of Appeal was filed in the Baltimore City Court on June 28, 1963.

2. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). Appellant challenges the constitutionality of the Maryland Retail Sales Tax Act as interpreted by the Court of Appeals of Maryland in its decision of April 11, 1963, on the ground that, as so interpreted, it is repugnant to the Constitution

of the United States of America and the decision of the highest court of the State was in favor of its validity. The following cases sustain the jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals of Maryland on direct appeal: *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167; *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542; *Canton Railroad Co. v. Rogan*, 340 U.S. 511.

QUESTIONS PRESENTED

1. Whether the Maryland Retail Sales Tax Act is invalid, on the grounds of repugnancy to the Constitution of the United States and particularly the provisions of Article I, Section 8, Clause 3 (Commerce Clause), by reason of its imposition on a stevedore of an excise tax measured by rentals under a lease of bulk unloading cranes located in Baltimore Harbor and exclusively used for unloading cargoes from ships from foreign and out-of-state points of origin, the lease involved having been entered and the cranes having been dedicated to such exclusive uses long prior to the enactment of the statute.

2. Whether the Maryland Retail Sales Tax Act is invalid, on the grounds of repugnancy to the Constitution of the United States and particularly the provisions of Article I, Section 10, Clause 2 (Import-Export Clause), by reason of its imposition on a stevedore of an excise tax measured by rentals under a lease of bulk unloading cranes located in Baltimore Harbor and exclusively used for unloading cargoes from ships from foreign and out-of-state points of origin, the lease involved having been entered and the cranes having been dedicated to such exclusive uses long prior to the enactment of the statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 (Commerce Clause) of the Federal Constitution provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian tribes;"

Article I, Section 10, Clause 2 (Import-Export Clause) provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws;"

Sections 324(d) and 325 of Article 81 of the Annotated Code of Maryland (1957 edition), as in force during the assessment period, June 1, 1955, through June 30, 1960, are set forth in Appendix B hereto.

STATEMENT OF THE CASE

The Comptroller of the Treasury of the State of Maryland made an assessment under the Maryland Retail Sales Tax Act for the period June 1, 1955, through June 30, 1960. The assessment concerned taxes which the Comptroller claimed should have been paid by a stevedoring concern, The Cottman Company, and represented an attempt to enforce a supposed tax collection duty against Appellant.

The sales tax asserted related to rentals paid by the taxpayer, The Cottman Company (hereinafter "Cottman") to Appellant for bulk unloading facilities, primarily large travelling cranes, located on an ore pier owned by Appellant and situated in Baltimore Harbor. The bulk unloading facilities covered by the lease had originally been owned by

Cottman, but on October 31, 1931, Appellant purchased the facilities from Cottman and simultaneously leased them back. The lease was supplemented by several agreements, the latest of which was dated February 4, 1954, and continued in force throughout the assessment period of June 1, 1955, through June 30, 1960. The lease contains no option to purchase the leased facilities in favor of Cottman. The primary rental applicable throughout the assessment period consisted of 20 cents per ton on all cargo handled by Cottman through use by it as a stevedore of the bulk unloading facilities, plus 30% of Cottman's net income, before taxes, in excess of $15,000.

The rented facilities, since 1931 and throughout the assessment period, have been used by Cottman solely to unload ships. No outloading of commodities has taken place. Cottman's operation of the cranes has been solely in the course of the stevedoring activities by which the commodities have been unloaded from the vessels. The cranes move along the pier on rails, and unload cargo from the holds of ships into railroad cars spotted beneath them, or onto a conveyor system which transports the commodities to a weigh station at the end of the pier. A copy of Appellant's Exhibit No. 7, a photograph showing the cranes in operation is attached as Appendix C.

Substantially all (over 98%) of the commodities unloaded over the ore pier by means of the leased facilities were metallic ores from foreign origins. Oyster shells, which originated at points in the United States outside of Maryland, comprised the balance (less than 2%) of the commodities unloaded over the pier. During the period 1955 through 1960, of the total of 1,797 vessels whose cargoes were unloaded, 1,768 carried foreign ores and 29 carried oyster shells. The respective tonnages were 17,118,513.60 tons of foreign ores and 264,622.05 tons of

oyster shells. All commodities unloaded at the pier have been delivered on the pier proper or at the weigh station at the end of the pier either directly to the consignees or to Canton Railroad Company for delivery to or in accordance with instructions of the consignees.

The Maryland Retail Sales Tax Act was first enacted by Chapter 281 of the Acts of 1947 of the General Assembly of Maryland. It did not apply to leases. By Chapter 332 of the Acts of 1955, the definition of "sale" was amended by insertion of the phrase "including rental, lease or license to use, or royalty".

The Court of Appeals of Maryland in its opinion in the instant case construed the 1955 amendment as making rentals under the lease from Appellant to Cottman subject to the tax for all periods from and after June 1, 1955, despite the fact that possession of the leased premises had been continually in Cottman since at least October, 1931, and although the definition of a taxable sale contained in Article 81, Section 324(d) requires a "transaction whereby title or possession, or both, of tangible personal property is or is to be transferred . . . ". The court interpreted the Maryland statute as imposing the tax on the lessee's "continued right to possession of the leased property". It also referred to "continuance of possession" as the taxable event.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The Federal questions to be reviewed in this Court were raised before the Comptroller of the Treasury in oral argument. In the opinion filed on December 20, 1961, by the Comptroller's Hearing Examiner, the validity of the tax, under the Commerce Clause and the Import-Export Clause, was reviewed. The Hearing Examiner concluded:

> "I am of the opinion that the sales tax on these rental transactions is not contrary to the Constitution of the

> United States and is a valid exercise of the taxation power of the State of Maryland."

He further stated in his opinion:

> "The rental of tangible personal property is subject to the Maryland Retail Sales Tax Act. The assessment of the tax against Canton in the instant case is not violative of the Constitution of the United States."

In the petition filed by Appellant in the Baltimore City Court, one question of law presented for review was:

> "Is the attempted imposition of sales tax or of use tax against The Cottman Company, as lessee from Canton Company of Baltimore, a tax or other burden on foreign commerce and on interstate commerce prohibited by the Federal Constitution?"

The judge in the Baltimore City Court in his oral opinion stated:

> "I do not think this violates the import-export clause."

Although the judge did not mention the Commerce Clause, the question of the validity of the Act under that constitutional provision, as well as under the Import-Export Clause, was briefed and argued by Appellant.

In the Court of Appeals of Maryland, both constitutional questions were fully presented by brief and oral argument. The court in its opinion, 231 Md. at page 298, 190 A. 2d at page 94, page 3A of Appendix A, stated:

> "Finally, the appellant contends that the tax is in violation of the Federal Constitution, as a burden on interstate and foreign commerce, and as contravening the import-export clause. We do not so read the cases."

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are similar to those raised by *Puget Sound Stevedoring Co. v. State Tax Comm.*, 302 U.S. 90, in which an appeal was taken from a State court decision which upheld a tax on the gross receipts from stevedoring activities. This Court unanimously allowed the appeal and held the tax to be invalid as applied to stevedoring activities, "the business of loading and unloading being interstate or foreign commerce" (302 U.S. at p. 94). Thereafter, this determination was re-affirmed in *Joseph v. Carter & Weekes Co.*, 330 U.S. 422. That case arose on certiorari because the State court had held the tax imposed on the gross receipts of a stevedore to be invalid.

The majority in the *Carter & Weekes Co.* case rested its decision on the Commerce Clause, saying:

> "Stevedoring, we conclude, is essentially a part of the commerce itself . . ." (330 U.S. at p. 433).

Justices Douglas and Rutledge concurred on the grounds that the stevedoring was clearly part of the export process, and so the tax imposed on a step in the export process was an impost forbidden by the Import-Export Clause (Article I, Section 10, Clause 2). The view that stevedoring is part of the import process is fully supported by *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419, which held a franchise tax on the selling activities of an importer to be an invalid impost on imports. Stevedoring, occurring at an even earlier stage, is patently part of the importation process.

Nothing in *Canton Railroad Co. v. Rogan*, 340 U.S. 511, and *Western Maryland Railway Co. v. Rogan*, 340 U.S. 520, weakens prior holdings of this Court to the effect that stevedoring is a part of commerce and of the import

process. Those decisions concerned rail movements subsequent to the stevedoring. The taxpayers were not engaged in the import-export business, whereas Cottman is so engaged.

Even though the Commerce Clause has been recognized as less prohibitory of State taxation than the Import-Export Clause, prior decisions of this Court under the Commerce Clause all point to the invalidity of the tax here involved. The tax is based on the continuance of possession by the stevedore of an instrumentality of commerce and measured by a percentage of the rental paid for such instrumentality. Although the tax is denominated a "sales" tax, it has no relation to a transfer of title such as the word "sale" usually connotes. Not even a transfer of possesion is involved since Cottman has continued in exclusive possession of the instrumentality of commerce since no later than October, 1931, i.e. sixteen years prior to the enactment of the Retail Sales Tax Act and twenty-four years prior to the extension of that Act to rental transactions.

Continuance of possession after the instrumentality has been dedicated to commerce is essentially identical with the incidence on which use taxes are normally based. A use tax may not constitutionally be imposed on an instrumentality of interstate commerce. *Helson & Randolph v. Kentucky*, 279 U.S. 245. That case was distinguished in the companion cases of *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, and *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182, but only on the grounds that there was a moment in time prior to the taxpayer's dedication to interstate commerce of the objects there taxed, which afforded a local, intrastate incidence to sustain the tax. Here, however, no less than twenty-four years had elapsed since the unloading facilities had been exclusively employed in commerce by the stevedoring taxpayer and before the tax was imposed.

so no such justification exists for the tax here under consideration. Cf. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203, 205.

The continued vitality of the principle of the *Helson* case is demonstrated by *Capitol Greyhound Lines v. Brice*, 339 U.S. 542. The case upheld the Maryland 2% titling tax imposed with respect to buses employed on interstate routes. It did so on the basis that the tax was imposed to exact compensation for use of the Maryland highway system. Without such a "compensation" basis, the Court clearly regarded the tax on instrumentalities of commerce as invalid. The Maryland Retail Sales Tax Act neither generally nor in its particular application here seeks compensation for the provision by the State of facilities. The 2% titling tax involved in the *Capitol Greyhound Lines* case was essentially a sales tax, being an excise imposed upon transfer of title. The sales tax character of that statute is recognized by the provision of Article 81, Section 326(g) of the Annotated Code of Maryland, which exempts sales of motor vehicles upon which the titling tax is collected from the Retail Sales Tax Act.

Nor can the tax in the instant case be sustained on an "in lieu" basis. Cf. *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 with *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298. The record makes clear that the bulk unloading facilities leased to Cottman are subject to state and city property taxes to the same extent as other property in the State. The Maryland income tax applies to, and is paid by, Cottman.

Nor may the tax be upneld on the grounds that it in no way discriminates against commerce. In the first place, lack of discrimination will not sustain the tax where, as here, the incidence is exclusively interstate and foreign

commerce. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602; *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157. Moreover, as the latter case points out, a tax may lead to multiple taxation of commerce, even though, technically, it can be imposed only by one state. Had the gathering tax there imposed by Texas been sustained, a similar tax on the taking of possession of the articles of commerce could also have been imposed by all intermediate states, and the state of destination could have imposed a tax on unloading. The instant case imposes such a tax on unloading by taxing "continuance of possession" on the part of the stevedore of an instrumentality of commerce. Iron ore unloaded in Baltimore continuing to a destination point such as Youngstown, Ohio, will feel the burden of the tax because Cottman inevitably must reflect it in the charges it makes for stevedoring services. If continuance of possession of the instrumentalities by which articles in commerce are moved is a proper basis for state taxation, then Pennsylvania can levy a similar impost on the railroad based on the continuance of possession of the rails located in that State and Ohio can levy a tax on the continuance of possession of the equipment used to unload at the destination. The discrimination against interstate and foreign commerce resulting for such multiplicity of state taxes is apparent.

The stevedore's rental payments, by which the present tax is measured, are directly related to the tonnage handled. Hence, the burden on commerce in the instant case is substantially identical with, and no less than that imposed by the gross receipts taxes on stevedoring which were invalidated in *Puget Sound Stevedoring Co. v. State Tax Comm.*, 302 U.S. 90, and *Joseph v. Carter & Weekes Co.*, 330 U.S. 422. Cf. *Case of the State Freight Tax*, 15 Wall. (82 U.S.) 232, invalidating a tax on a railroad operator measured by the tonnage of freight carried.

With regard to the Import-Export Clause, virtually all (over 98%) of the commodities handled by the bulk unloading facilities were imports. Continuance of possession by Cottman of the bulk unloading facilities was patently a crucial aspect of its stevedoring operations. The tax, consequently, was levied on the business of stevedoring. The constitutional prohibition of imposts or duties on imports or exports is far more unyielding than the limitation on State taxation found in the Commerce Clause. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 75-76, which held unconstitutional a sales tax levied on an export itself. It has long been recognized that burdens on instrumentalities employed in the export or import process are themselves imposts forbidden by the Import-Export Clause. The principle was early established in *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419, 444, which held that "a tax on the occupation of an importer is, in like manner, a tax on importation".

Cases under Article I, Section 9, Clause 5 of the Constitution prohibiting a Federal tax on exports are persuasive authority with respect to the constitutional prohibition in Article I, Section 10, Clause 2 against State imposts on imports and exports. See *Richfield Oil Corp. v. State Board of Equalization, supra*, at page 83. *United States v. Hvoslef*, 237 U.S. 1 invalidated as a tax on exports a stamp tax on charter parties for vessels carrying cargoes from United States ports to foreign ports. A charter party for a vessel engaged in an export movement is, of course, substantially equivalent to a lease and, a tax thereon, therefore, presents a situation substantially identical with the instant tax placed on a lease of facilities moving imports in the course of the importation process.

The State of Maryland itself recognizes, in its Rules and Regulations under the Retail Sales Tax Act, the invalidity

of a tax measured by proceeds of a sale or lease of instrumentalities of interstate and foreign commerce. Rule 64 provides:

> ". . . Sales of vehicles which will regularly transport passengers or property across State lines or in foreign commerce are also exempt. . . ."

The Rule implements the exemption in Article 81, Section 326(f) of the Annotated Code of Maryland (1957 edition) for:

> "Sales which are not within the taxing power of the State under the Constitution of the United States."

If a State tax on the sale (including lease, because of the statutory definition) of the ocean vessel which brings the imports to pierside is invalid, so too must a tax be invalid if imposed on the "sale" of the stevedore's bulk unloading equipment, which is just as much an instrumentality of the importation process.

The consideration that the Maryland Retail Sales Tax Act is of general application, and also reaches many other transactions without infringing the Constitution, in no way acts to validate it in cases such as the present one. At most it camouflages, but does not remove, the Constitutional infirmity. Cf. *Spalding & Bros. v. Edwards*, 262 U.S. 66, 69:

> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant. . . ."

It is submitted that the decision of the Maryland Court of Appeals ignores the clear prohibition contained in the Commerce Clause (Article I, Section 8, Clause 3) and the Import-Export Clause (Article I, Section 10, Clause 2) of the Constitution as interpreted by prior decisions of this Court. The decision finds no support in any prior rulings

of this Court, and, if permitted to stand, will serve as a precedent for further injurious attempts to tax commerce and the importation process and thereby to exact an impeding toll from those engaged in national and international commerce. See *Freeman v. Hewit*, 329 U.S. 249, 252, 254 The questions presented by this appeal are, therefore, substantial and of public importance.

Respectfully submitted,

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APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Opinion of Court of Appeals of Maryland

HENDERSON, J., delivered the opinion of the Court.

This appeal is from an order affirming an assessment by the Comptroller of sales taxes upon rentals paid to the appellant company by its wholly owned subsidiary, Cottman Company, for bulk unloading facilities located on a pier in the Baltimore harbor. The assessment concerns taxes for the period from June 1955 to June 1960 which the Comptroller claims should have been paid by Cottman, the stevedoring company, the tax collecting duty resting upon Canton. The lease to Cottman from Canton was entered into on October 31, 1931, at which time Canton had only a minority interest in the lessee. The lease included bridge cranes located on an ore pier owned by Canton. On that date the cranes were purchased from Cottman by Canton, and simultaneously leased to Cottman. Canton Railroad Company joined in the lease, having certain operating rights for the pier under a separate agreement. The primary rental was 12 cents per ton on cargo handled by Cottman through use of the cranes.

The appellant raises three questions on this appeal:

1. Are bulk commodity unloading cranes, and related facilities located on Canton's ore pier, tangible personal property within the meaning of the Maryland Retail Sales Tax Act?

2. Does the Act reach transactions that are genuine rentals of personal property and not sales of personal property disguised as lease transactions?

3. Is the attempted imposition of the tax a burden on foreign and interstate commerce prohibited by the Federal Constitution?

As to one, a number of supplemental agreements continued the lease in effect through the assessment period. None of these agreements was recorded, nor was any instrument governing title to the cranes recorded among the land records. Two of the cranes were located on the pier in 1931, and a third was installed by Canton in 1953. A fourth crane was installed in 1957. Crane No. 1 was dismantled and removed in 1960, and the parts sold for scrap. Crane No. 2 weighs approximately 800 tons, No. 3 and No. 4 weighs about 1150 tons each. The ore pier is used entirely for unloading vessels by Cottman Company, nearly 98% being foreign commerce, 2% interstate commerce. The cranes were mounted on rails, but could not leave the pier. They were specially designed for that location, and not suitable for use elsewhere.

The appellant argues that the cranes must be regarded as fixtures, and hence not subject to the tax on sales of tangible personal property. We do not agree. It may well be that if the question were whether they were subject to the terms of a mortgage, they could be regarded as constructively annexed to the real estate. See *Anderson v. Bldg. & Loan Ass'n*, 172 Md. 94. For present purposes, we would agree that they are an integral part of the pier operation, cannot be moved without dismantling by cutting the metal, and are not well adapted to general use elsewhere, if, indeed, they would be salable except for scrap. Nevertheless, we think the case of *Comptroller v. Kaiser Corp.*, 223 Md. 384, 391, is controlling. While the decision in that case was rested, in part, on the fact that the presses, compressors and cranes could be removed and installed at another location, the holding was also rested upon a construction of the statute that imposed the tax upon machinery and equipment, without regard to the doctrine of constructive annexation. We also stressed the fact that in that case, as in this, there had been a course of conduct by the parties, whereby the property had been treated as personalty. We also cited the common law rule, applicable to the taxation of property, as laid down in *Anne Arundel Co. v. Sugar Ref. Co.*, 99 Md. 481.

The assessment was made under Code (1957), Art. 81, Sec. 325, imposing the tax "[f]or the privilege of selling certain tangible personal property at retail as defined above * * *." By Sec. 324(d), sale was defined as "any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration *including rental, lease or license to use, or royalty*, by a vendor to a purchaser * * *." (Emphasis matter added in 1955). The argument of the appellant that the amendment should not be construed to cover a true rental agreement like that in the instant case is answered, in part, by our decision in *Comptroller v. Pittsburgh-Des Moines*, 231 Md. 132. The argument that it could not have been intended to impose a tax upon a transaction whereby the right to possession was transferred in 1931, even if this were constitutionally possible, is answered by the fact that, in substance if not in form, the right of possession is made to depend upon the periodic payment of rent, and since taxation is a practical matter, the Legislature may treat continuance of possession as a taxable event. Other courts have so held. See *Gandy v. State*, 359 P. 2d 302 (Wash.), *Richard Bertram & Co. v. Green*, 132 So. 2d 24 (Fla.), *Central Transportation Co. v. Atkins*, 305 S.W. 2d 940 (Tenn.) and *Broadacre Dairies v. Evans*, 246 S.W. 2d 78 (Tenn.). See also *United Artists Corp. v. Taylor*, 273 N.Y. 334, 7 N.E. 2d 254.

In concluding that the Legislature intended to tax rentals of this nature we also rely upon the fact that other amendments in 1955 specifically exempted certain rentals and recurrent services, and to certain indications in the title of the act, to which we may look as bearing upon legislative intent. *Kimball-Tyler v. Balto. City*, 214 Md. 86, 96.

Finally, the appellant contends that the tax is in violation of the Federal Constitution, as a burden on interstate and foreign commerce, and as contravening the import-export clause. We do not so read the cases. It is true that Cottman Company is the taxpayer, Canton merely the collecting agent. But if Cottman bought a crane today, or any other article of personal property, the fact that it was intended

to be used tomorrow for unloading vessels would not render Cottman immune from the levy of a sales tax. See *McGoldrick v. Berwind-White Co.*, 309 U.S. 33. See also *McLeod v. Dilworth Co.*, 322 U.S. 327 and *Gen. Trading Co. v. Tax Comm'n*, 322 U.S. 335. Cf. *S. T. C. of Utah v. Pac. States Pipe Co.*, 371 U.S. 810. Of course, a tax could not be imposed directly upon the stevedoring operation. See *Puget Sound Co. v. Tax Comm'n*, 302 U.S. 90, *Canton R. Co. v. Rogan*, 340 U.S. 511, and *Joseph v. Carter & Weekes Co.*, 330 U.S. 422. Cf. *Richfield Oil Corp. v. State Board*, 329 U.S. 69. The appellant admits in its brief that the question turns on whether the title or right to use the cranes was acquired prior to and independently of the transferee's activities in interstate and foreign commerce, or whether the taxable event is the use in those activities. We think it is the former, even though the amount of rent, and hence the economic incidence of the tax, may be measured by the tonnage handled. It does not follow that because the rental is measured by the amount of use, the tax is on the use. The tax is on the continued right to possession of the leased property. We are referred to no case, and we have found none, that forbids the imposition of such a tax.

Judgment affirmed with costs.

Opinion of the Baltimore City Court

FOSTER, J.:

Gentlemen, I wish my schedule and time permitted the preparation of a written opinion in this case, because I do find it very interesting and counsel have given it exhaustive study. I thoroughly enjoyed reading Mr. Murnaghan's memorandum, even though it kept me up quite late, but it was beautifully done and very competently prepared. I compliment you, and also counsel on their arguments presented to the Court. However, because of my schedule and other cases which must be disposed of, I am going to give you my conclusions at this time.

I shall consider first the original issue answered by the Comptroller, or the question: Are those cranes part of the realty or are they tangible personal property? Mr. Murnaghan in his three-pointed argument suggests that the Comptroller takes comfort from the *Kaiser* case primarily on the facts. While I think the *Kaiser* case is controlling, I do not believe that the position of the Comptroller springs solely from a comparability of the facts in *Kaiser* and in *Canton*. This problem of what is realty and what is personalty is certainly not an easy one. I recall reading not too long ago a report on the business of moving buildings — Mr. Murnaghan in his memorandum refers to moving houses. As I recall a contractor moved a ten-story office building — a telephone exchange, I think — several miles through a major city, so I do not believe the movability of property any longer is really of any great significance when related to size. It has been strenuously argued that these cranes cannot be moved. If a ten-story office building can be moved through the down-town section of a large city, then these cranes can be moved. The fact that there are buildings shoreward of the cranes, and those buildings would have to be removed in order to transport the cranes, I do not think is controlling. I conclude Kaiser would have had to cut openings in its plant walls to get some of the larger presses out of its building. Regardless of whether Canton would have to move something else from shoreward or not, it is resting its case on this point mainly on size. Is the property too big to move or is it small enough to move? I emphasize this is not the controlling factor in a tax case.

I think we can infer from the *Kaiser* case that the primary consideration is the intention of the parties involved. The common law being that machinery and equipment are personal property, is there anything in the statute here which changes this rule? I do not think there is. I think the intention is indicated here by the way Canton Company has treated these cranes on its books — the fact that they are depreciated differently from other assets of the Canton Company — although this again in itself is not a sole determining factor, is very important. Mr. Engelbert has pointed out that Canton applied different rates of de-

preciation; and I gather from the picture here that the taxpayer has treated these cranes as personalty; and I conclude, from the language of the *Kaiser* case, that that is one of the ways we should really make our determination. I find that these cranes can be moved, if this is important, were considered personalty and, therefore, on the first question I reach the conclusion that these cranes should be treated as personalty.

Now, coming back down the ladder we arrive at the question of whether or not the sales tax was enacted with the intention of reaching rentals. I must confess that after reading Mr. Murnaghan's memorandum, and because I also had occasion to go into this bailment-lease situation in practice and since I have been on the Bench, and since the *Alban* case just preceded the amendment to the Maryland Sales Tax Law, up to Mr. Engelbert's argument — and I do not think he has gone outside the record — I really thought that Mr. Murnaghan has argued, but I do not believe now, that the amendment to the sales tax law to include rentals was solely for the purpose of catching bailment-leases. You and I probably would not have made the amendment as Mr. Engelbert did, but it was his responsibility; he made the amendment, and I think, with all of the additional background material he has furnished me, it is quite obvious this is a sales tax on rentals; this type of rental was intended by the Legislature to be taxed.

Finally, taking your initial argument, the last one referred to by Mr. Engelbert, the constitutionality of the imposition of the tax on this class of assets on the docks — I do not think this violates the import-export clause. If it did, I think it would be virtually impossible to tax anything, if I may make such a broad statement, in the area of the waterfront.

For these reasons I will affirm the decision of the Comptroller in the case.

Opinion of Hearing Examiner

This hearing was held January 19, 1961, in the hearing room of the Office of the Comptroller of the Treasury of Maryland, 301 W. Preston Street, Baltimore, Maryland.

The hearing arose on the petition of The Canton Company of Baltimore protesting an adjusted use tax assessment of $53,704.58, accrued during the period June 1, 1955, to June 30, 1960, including taxes in the amount of $42,707.42, interest of $6,726.42, and penalty of $4,270.74; and the petition of The Canton Railroad Company protesting an adjusted use and/or sales tax assessment of $816.83, accrued during the period June 1, 1955, to June 30, 1960, including taxes of $649.58, interest of $102.31, and penalty of $64.96; and the petition of The Canton Railroad Company protesting the denial of its claim for refund in the amount of $4,343.20, representing certain sales taxes collected by the Retail Sales Tax Division during the period 1955, to 1960.

The facts of each petition are founded in the same matter, therefore the petitions have been consolidated for hearing and determination.

Statement of Facts

The Petitioner, The Canton Company of Baltimore (hereinafter called Canton) and The Canton Railroad Company (hereinafter called Railroad), protest the assessment of retail sales and/or use taxes with penalties and interest which the Retail Sales Tax Division claims to be due by reason of certain rentals. Railroad further claims a refund of sales taxes previously paid, taking the position that if the rental of certain self-propelled railway cranes gives rise to a retail sales and use tax, the original purchase of these cranes is not subject to such tax.

Canton Company

In April of 1916, Canton was the owner of a pier at Point Lazaretto in the Baltimore harbor. The Clarence Cottman Company, successor to the Cottman Company (hereafter called Cottman), erected and placed on the pier cranes and other cargo handling equipment used in the unloading of bulk ore vessels.

On September 15, 1927, Canton entered into a lease with Railroad whereby Railroad acquired the use and control of the pier.

On October 31, 1931, Canton purchased from Cottman the cranes, cargo handling equipment and Cottman's other property located on the pier. At the same time Canton executed an agreement leasing back to Cottman the same property, described in the lease as "two bridge cranes, cargo trimmers, crane scows, electric sub-station, office and other buildings, and all other machinery, equipment and other property located on or adjacent to said ore piers (all called cranes hereafter)", (P. Ex. 1, T. 16). Railroad joined in this lease granting the right to Cottman to use and maintain the cranes on the pier which Railroad controlled under its 1927 lease from Canton.

The lease of October 31, 1931 (P. Ex. 1), provided among other things for a fifteen year term counting from the first day of November 1931; that Railroad would maintain the pier, tracks, warehouses and slips; that any damage to the pier or property thereon was at the risk of the negligent party; that Cottman, the lessee, was to operate, repair, service, replace and maintain the cranes (the term cranes being used to include the whole subject matter of the lease except the pier proper, including the cost of replacement of renewal of worn out, destroyed or damaged property, any such replacements to become the property of Canton; that Cottman was to manage the ore unloading business; that Canton was to insure the cranes, Cottman to reimburse Canton for premiums and that the proceeds of any payment by reason of loss was to be paid to Cottman up to the cost of repairs, the balance to be paid to Canton; that Canton was to be responsible for and pay all State or City taxes on the cranes, Cottman to reimburse Canton for the same; that the rental was based on tonnage of cargo handled, the payments being apportioned between Canton and Railroad; that Canton was to keep the premises, neat, clean and to save harmless Canton and Railroad from any suits or claims arising in connection with Cottman's use of the facilities. Cottman agreed to

surrender the premises leased at the end of the term in as good a condition as when received. The lease further provided that Canton or Railroad could cancel the lease and re-enter and take possession if Cottman breached any of the terms of the lease or if Cottman became bankrupt, insolvent or went into receivership. Cottman further agreed to operate no other bulk ore unloading facility in the Baltimore harbor and that it would not assign the lease or sublet except with the consent of Canton and Railroad. It was also provided that the successors or assigns of any of the parties should be bound by the terms of the lease. The lease was executed under seal, but it was not recorded among the Land Records of Baltimore City (P. Ex. 1, T. 13).

On August 28, 1946, Canton and the Railroad entered into a supplemental agreement wherein the original lease of 1931 was extended to December 31, 1947. All of the provisions of the original lease were continued in effect with the exception that the tonnage base factor for rental payment was changed.

On July 1, 1947, another supplemental agreement was entered into by the parties wherein the original 1931 agreement and all its terms, except that the rent was increased, was extended to December 31, 1949 (P. Ex. 1).

On November 30, 1949, another supplemental agreement was made by Canton, Railroad and Cottman. Once again the 1931 lease with all its original terms as modified by the 1946 and 1947 agreements was extended to December 31, 1950.

By agreement dated December 31, 1950, the 1931 lease was extended to January 31, 1951.

During the period January 31, 1951, to April 1, 1951, Cottman occupied on a month to month basis, and on April 1, 1951, another agreement was executed between the parties extending the original 1931 lease to December 31, 1951, and thereafter from year to year. The 1931 lease was modified in that it was agreed that the lease could be cancelled

upon three months notice prior to December 31st of any year and the rates of payment were changed.

On February 4, 1954, the apportionment of rental payments was altered as between Canton and Railroad.

None of the supplemental agreements entered into by the parties subsequent to 1931 were formally executed and sealed, although they were signed by the parties thereto, nor had they been recorded among the Land Records of Baltimore City (P. Ex. 1, 27, T. 13).

The parties to these leases are inter-related. Canton is the parent; Railroad is a wholly owned subsidiary of Canton, having been acquired in 1906; Cottman is likewise a wholly owned subsidiary of Canton, the majority stock thereof having been acquired by Canton in 1950.

Opinion — Canton

The assessment against Canton is based on its failure to collect and pay over to the State of Maryland, sales and/or use taxes on the rental value of the cranes leased to Cottman under the terms of the 1931 lease and subsequent agreements.

Canton bases its objection to the assessment of the tax on three grounds; (1) that the cranes in question constitute realty and not tangible personal property, that the rental of real property is not within the scope of the tax imposed and that, therefore, the rentals in question are not subject to the Maryland sales and use tax; (2) that even if the cranes are considered tangible personal property, the rental of them is not subject to the Maryland use and sales tax, because the word "rentals" as used in the Sales Tax Act should be taken to mean only those rentals which are in fact disguised purchases (as for example, a hire-purchase agreement), and that true rentals such as these transactions are not subject to the tax; (3) that the activity attempted to be taxed here, that is the rental of cranes which are used by a lessee engaged in the unloading of cargo originating in foreign countries, is for-

eign commerce and, therefore, under the Constitution of the United States is immune from taxation by the State of Maryland.

As the Petitioner contends, the Sales and Use Tax Act does not reach transactions involving real property (except in cases of rental of rooms), it is therefore necessary to determine whether or not the bulk ore unloading cranes are tangible personal property within the meaning of Article 81.

By the terms of the lease dated October 31, 1931, the lessee, Cottman, agreed with the lessors, Canton and Railroad, that it would maintain, repair, renew and replace all of the cargo handling equipment. However, the lessee, Canton, has in fact replaced certain of the equipment on the pier, as for example, two cranes (S. Ex. 1) and a conveyor belt cargo handling facility (S. Ex. 2).

In 1931, at the time of the original lease from Canton to Cottman, there were on the pier, among other pieces of equipment, two large bulk ore unloading cranes known as Crane No. 1 and Crane No. 2. Crane No. 1 was located on the water end of the pier and Crane No. 2 was located on the land end (T. 17). In 1953 Canton installed Crane No. 3 on the water end of the pier beyond Crane No. 1, and in 1957 Canton installed Crane No. 4 on the extreme water end of the pier beyond Crane No. 3. In 1960 one of the original cranes, Crane No. 1, was removed from the pier so that at the time of this hearing there remained on the pier three cranes, known as Cranes Nos. 2, 3 and 4.

The bulk ore unloading cranes in question (hereafter referred to as cranes), are large self-propelled traveling cranes which operate on rails or tracks laid on the pier floor. These rails or tracks extend from about fifty feet on shore to the seaward end of the pier. Although the cranes vary somewhat in particulars, basically they may all three be fairly described as being electrically motivated large structural steel vehicles rivetted and welded together. Crane No. 2 stands approximately one hundred feet high from the pier floor, Cranes No. 3 and No. 4, one hundred

and fifty feet. Each has adjustable side members or arms which can be extended out to the sides of the pier over a ship which would lie along side the pier (T. 49). With the arms fully extended the cranes have a width of about two hunded and sixty feet, retracted about one hundred and thirty feet. The extended arms are used to transport scoops or buckets by means of cables and rollers over the hold of an ore ship lying along side of the pier. The buckets are then lowered into the hold of the ship and ore or other bulk material is scooped up, lifted out of the ship and withdrawn back over the pier. The contents of the bucket is then either dumped into a freight car or truck standing on the pier beneath the crane proper or the load is dumped onto a conveyor belt which runs the length of the pier, the belt would then convey the ore to a hopper on shore. The spread between the right and left hand wheeled legs upon which the crane rests is of sufficient width and height to permit several freight cars to pass beneath the cranes. The cranes are operated by electric power, there being an electric bus bar which runs along one side of the length of the pier. Each crane receives its electrical power through a friction connection or trolley which runs along the bus bar as the crane moves back and forth on the track to different docking locations along the length of the pier. The cranes are in no manner affixed or permanently attached to the pier or land, but are held upon the rails by their own weight, nor are they directly connected to the pier or land by electrical or other utility services. All three of the cranes move on one set of rails, hence they are unable to pass one another, their relative positions on the pier being fixed.

Cranes No. 3 and No. 4, which were installed by Canton subsequent to 1931, were constructed at the site for Canton by Heyle and Patterson, Inc. of Pittsburgh, Pennsylvania (S. Ex. 1). Crane No. 3 cost $1,200,000.00 and Crane No. 4 cost $1,300,000.00 (T. 31 and 32). At the time of the construction of Crane No. 4 Canton paid approximately $18,000.00 to the Retail Sales Tax Division as use tax on the component parts. No use tax was paid on Crane No. 3 since it was held to be an item not readily available in

Maryland and at that time the statute permitted a tax exemption in such cases. These cranes were not stock equipment and were constructed by the contracting engineers from specifications furnished by Canton. The raw materials and component parts for the cranes were assembled at the site by Heyle and Patterson and the cranes were erected on the pier over a period of about one year.

In 1950 Crane No. 1 (one of the original items covered under the 1931 lease) was determined no longer serviceable and was removed. It was dismantled on the pier and removed piecemeal. The removal was accomplished under a contract wherein the scrap material became the property of the wrecker and Canton paid in addition $65,000.00 for the work (T. 80).

In 1950 Canton entered into a contract with Robins Engineers of New York, N.Y., for the construction of a conveyor belt system on the pier at a cost of approximately $1,850,000.00 (S. Ex. 2). The conveyor belt system, located at the side of the pier, consists of a large endless belt which moves on rollers from the extreme seaward end of the pier to the land. On land there is a building which houses a hopper and weighing equipment. Ore which is unloaded from the ships by means of the cranes is dumped on the conveyor belt on the pier. The conveyor belt transports the bulk ore back to the land and up into the hopper where it is stored or weighed and dumped into trucks or railroad cars for subsequent removal from the premises. The conveyor system, like the cranes was constructed on the pier site by assembing the component parts which include mechanical and electrical equipment, structural steel members and the like. Sales taxes in the amount of $20,000.00 were paid on the component parts of the conveyor system (T. 47).

The Petitioner relies on the theory of attachment of fixtures and says that this rule of law is determinative of the status of these cranes. He insists that because of the size and cost of the cranes and the fact that they may not be easily or readily moved to another site, that they should

be denominated as realty and not tangible personal property.

It cannot be disputed that personalty may be converted to realty by attachment to real estate, however, such attachment must be of a permanent nature or at least of such a semi-permanent nature that the personalty or fixture cannot be easily removed without damage to the realty, as for example, the installation of radiators in a home or machinery in a manufacturing plant. Although this may be taken as a general statement of the law there is very good authority denying the application of this rule in taxation cases. In the case of The County Commissioners of Anne Arundel County v. The Baltimore Sugar Refining Company, 99 Md. 481, the county attempted to tax sugar refining equipment as realty, the taxpayer contended it was personalty. At Page 484 the court said, "The classification of property for taxation as real or personal is usually made on common law distinctions, though by statute it may be otherwise provided. At common law, fixed or movable machinery are alike regarded as personal property. The law of fixtures, as between vendor and vendee, lessor and lessee, mortgagor and mortgagee, though recognized here (in Maryland) as to these parties, has never been imported into the law of taxation".

The case of Comptroller v. Kaiser, 223 Md. 391, refers to the Baltimore Sugar case, citing also Kimball-Tyler v. Baltimore City, 214 Md. 86 and Maryland Glass Corp. v. Comptroller, 217 Md. 241, wherein it was held that glass making machinery was subject to use tax and that the law of annexation of fixtures did not apply.

Even if I were to agree that the law of fixtures applied to this case, the facts do not warrant a finding of a transformation in the character of these cranes. In the case at hand the cranes are in no manner affixed or attached to the realty except by their own weight. The cranes stand on wheels which traverse railroad tracks. The only other connection with the land is for the purpose of supplying electrical energy with which to operate the crane, but even here the crane is not affixed by way of cables or wires,

but rather receives its electricity through a trolley system similar to that used by a street car. It is true that the cranes are very large in size and weight, however, I fail to agree that mere bulk of size alone should control whether an object would become realty by operation of the law of fixtures or whether it would retain its character as personalty. I can see no basic distinction between the ore cranes in question and an electric railroad locomotive or the railway self-propelled cranes owned by Railroad, except that the ore cranes are larger. There certainly can be no question as to the classification of the latter two items. It seems unreasonable that the law of fixtures should apply merely because an object happens to be large and not apply in those cases where the object is small. If this be the rule of law, where is the line to be drawn? How big must an object be, or how much must it weigh, or how much must it cost in order to bring it within the law of fixtures? There was testimony at the hearing that it would be impossible to move these cranes to another site and yet the fact remains that the cranes do move from one end of the pier to the other. There seems to be no reason why the cranes could not be moved from one site to another by the extension of the land and of the rails or tracks. It may be true that it would be expensive or inconvenient for the Petitioner to have done so, but this does not establish that could not have been done.

The leading case in Maryland on the law of fixtures is Dudley v. Hurst (1887), 67 Md. 44. This case involves the question of attachment of large canning machinery to determine the character of the property as between a mortgagee and a mortgagor. At Page 47 the court says, "The term fixtures is generally used in reference to some originally personal chattel which has been *actually* or *constructively* affixed either to the soil itself or some structure legally a part of such soil. The tests by which a fixture is determined are generally these; (1) annexation to the realty, either actual or constructive; (2) adaptation to the use of that part of the realty with which it is connected; (3) the intention of the parties making the annexation to make the article a permanent accession to the freehold.

the intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation and the purpose for which it was annexed. At Page 50 the court goes on to say, "where in the case of machinery the *principal* part becomes a fixture by *actual* annexation to the soil, such parts of it as may not be so physicially annexed, but which if removed would leave the principle thing unfit for use and would not of itself and standing alone be well adapted for general use elsewhere, is considered constructively annexed, as for example the key of a lock, the sail of a windmill, the belt of a sawmill, all of which would pass by constructive annexation. They must be such as go to complete the machinery which is affixed to the land and which if removed would leave the principle thing incomplete and unfit for use". The Dudley case would indicate that a *principle thing* may not, by constructive annexation, change in character from personalty to realty, but that the principle thing, in our case the cranes, must be actually annexed, and if the principle thing is actually annexed such annexation will take with it, by constructive annexation, other parts or attachments of the principle machinery which are not actually physically attached to the realty. There must, however, be a principle piece of machinery which is actually and physically attached in order to give rise to a resulting constructive attachment or annexation.

The Petitioner cites Consolidated Gas, Electric Light and Power Co. v. William A. Ryan, 165 Md. 484, as authority for his argument that the size of the bulk unloading ore cranes determines that they are realty by the law of attachment of fixtures. I do not agree that the Consolidated Gas Case stands for this proposition. At Page 491 the Court cites with approval the opinion of Dudley v. Hurst. The intention to make a chattel a part of the realty must be accompanied by annexation, that is by physical attachment or what under the special circumstances of the case the court regards as equivalent to physical attachment. It is only when such actual or constructive annexation is indicated or shown to exist that the question of its adaptation to the use of that part of the realty to which it is connected, or

the intention of the party making the annexation to make the article a permanent accession to the freehold, or the situation of the party making the annexation, or the mode of annexation and the purpose for which it was annexed become factors in determining the question whether the chattel has become a fixture and forms a part of the freehold.

In the case of the traveling cranes there is no actual physical annexation since the cranes are operating on railway wheels and they are in no way directly attached permanently to the land. This same situation obtained in the Consolidated Gas Case. The next question then is the determination as to whether or not the cranes became annexed by constructive affixation. Until we can determine whether or not there is annexation to the realty, actual or constructive, we do not reach the determination of the other two requirements of fixtures, that is adaptation and intention. As was stated in the Dudley Case constructive annexation can only exist if it accompanies actual annexation. The theory of constructive annexation is applied only in those cases where the principle piece of machinery becomes affixed by actual annexation and such other collateral parts which are part of and necessary to the principle machinery, but not actually attached to the realty, are by constructive attachment part of the realty. The Court in the Consolidated Gas Case at Page 493, citing the Dudley Case, states that where in the case of machinery, the principle part becomes a fixture by actual annexation to the soil, such parts of it as may be not so physically annexed, but which if removed leave the principle thing unfit for use, and would not of itself if left standing alone be well adapted for general use elsewhere, is considered constructively annexed. In the Dudley case there are some articles not actually annexed to the soil, such as crates, capping machine and work tables, but which parts are essentially necessary to the workings of the principle machinery and pass by constructive annexation since the main machinery would not be in working condition without them and they are not adapted for general purposes. In the Consolidated Gas Case the Court said, "In this case

the crane itself is not actually attached or annexed to the freehold, nor do we think it can be regarded as constructively attached thereto. There was no part of the machinery that could become a fixture by actual annexation to the soil, that could be regarded as a principle part of the machinery, in connection with which the crane was used, and by said rule would have left such principle part of the machinery unfit for use. The crane of itself and standing alone is well adapted for general use elsewhere". In the case at hand, if the ore unloading cranes themselves had become by actual annexation a fixture, part of the realty, then by constructive annexation the buckets and scoops and other unloading gear would become also realty by the law of fixtures.

11 M.L.E., Fixtures at Page 103 cites the case of Anderson v. The Perpetual Building and Loan Association, 172 Md. 94, wherein it was said, "Where the principle part of machinery becomes a fixture by actual annexation to soil, the fact that part of it may not be so physically annexed, does not prevent *all* machinery from being constructively annexed where removal of such part would leave principle machinery unfit for use and would not of itself and standing along be well adapted for general use elsewhere".

I do not understand the law of fixtures to mean that the mere intention of the parties alone, can as to a third person, change personalty to realty by constructive attachment.

In the case at hand the intention of parties seems to be immaterial. As was said in the case of Gorn v. Hammond, 218 Md. 184, an item of personalty, which is attached to the realty and would therefore normally, by the law of fixtures become realty, may by agreement of the parties retain its character as personalty, however, such an agreement may not effect the rights of non-consenting third parties. This being so I can see no reason why any understanding, intention or agreement of the parties in this case should be permitted to effect the taxability of an item. Were this the case, would it not be possible for a person to extend the law of fixtures by intention and constructive attachment, to remove many, many items normally classified as personalty from the

operation of our Sales Tax Act? It seems that the determination of whether or not the item is personalty or realty and therefore subject to the tax is to be made by the Comptroller in conformity with the law, rather than to be determined by any intention of the taxpayer.

I therefore find as a fact that the cranes are not realty in the strict sense, nor have they taken on the characteristics of realty for the purposes of the statute by the application of the law of fixtures.

The next issue to be decided is whether or not pure rentals are subject to the tax or whether, as the Petitioner contends, only those rentals in the nature of disguised purchases are subject to the tax.

Section 325 of Article 81 imposes the tax on two things. It imposes the tax on the privilege of selling tangible personal property at retail and also on the privilege of dispensing certain selective services which fall within the definition of "sales" under the statute. Section 324 defines a sale as meaning:

> "Any transaction whereby *title or possession* or both, of tangible personal property is transferred *by any means whatsoever* for a consideration including *rental, lease or license to use, or royalty* * * *".

The statute does not speak of the passage of title alone, which would be the normal incident of a sale, but relies on passage of title *or* possession. The statute further states that such title or possession which passes for any consideration or by any means whatsoever shall be subject to the tax. The types of consideration and means of passing title or possession are enumerated in the statute as including rental, lease or license to use, or royalty. If the legislature had not intended that pure rentals or leases should be subjected to the tax, it would not have included this language. The last sentence of this sub-section seems to buttress this position since it incorporates two exceptions to a rental transaction. The inclusion of the terms "rental", "lease", "license to use", and "royalty", all of which are terms de-

noting transfer of possession by other than an outright sale, must have been intended to have some signficance. If only disguised sales were to be included it would have been relatively simple for the legislature to have said so, as for example "sales in the nature of rentals". This is a definition section, not an imposition section, it is manifest that the wording be understood as a definition. This being so there is no room to apply normal usage or meaning rules to words defined therein. It is beside the point what "sale" means in other usage. The legislature has defined it for purpose of this tax.

At 172 A.L.R. 1319, there is cited the case of Blauners, Inc. v. Philadelphia, 330 Pa. 342, 198 A. 889, in which the court stated that an ordinance carrying its own definition of sale rendered immaterial the technical meaning of the word "sale" at common law or the meaning of the word as used in other enactments. In the Pa. Statute sale is defined as meaning, "any transfer of title or possession".

In the same annotation the case of Philadelphia Association v. Philadelphia, 139 Pa. Supp. 560, 12 A. 2d 789, is cited. The sales tax statute here defined a sale as, "any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or means whatsoever for a consideration, or any agreement therefor". In this case the taxing authority assessed a tax on the rental of linen supplies to business establishments. The court held that the transaction was taxable as a sale under the statutory definition since the transaction constituted a transfer of possession of tangible property with a license to use the same for a consideration. Likewise, in the case of United Artists Corp. v. Taylor, 273 N.Y. 334, 7 N.E. 2nd 254, the court upheld the application of a sales tax assessment on the rental of motion picture films under a sales tax statute which defined the word "sale" as meaning, "any transfer of title or possession of license to use or consume".

As it said in 47 Am. Jur., Sales and Use Taxes 24, "Most sales tax statutes contain their own definition of the term sale at retail or have certain clauses which have the effect

of defining it in part and usually these definitions enlarge upon the common acceptance of the term and often expressly include within their scope transactions which would not ordinarily be considered sales. The Legislative definition of the phrase will prevail over definitions which may be found in a dictionary, and render immaterial the question whether a transaction upon which a tax is levied meets the technical requisites of a sale at common law or the meaning of the same word as used in other enactments".

In the case of Bertram v. Green, Comptroller of Florida, 132 S. 2nd 24, the question of the interpretation of the Florida Sales Tax Statute as regarded rentals was raised. Section 212.02(2) of the Florida Statute provides, "Sale means any transfer of title or possession, or both, exchange, barter, lease or rentals, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration". At Page 26 the court says, "It is apparent from a reading of the definition of 'sale' that a lease of tangible personal property is in fact a sale. When a statute contains a definition of a word or phrase that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent clearly appears".

The Tennessee Sales Tax Act is somewhat similar to the Maryland Act in that the term sale is defined to include any transfer by lease or rental of tangible personal property. In the case of the Central Transportation Co. v. Atkins, Commissioner, 305 S.W. 940, the Supreme Court of Tennessee interpreted the definition of "sale" in the statute to include pure rentals, the effect of which was to assess a tax on the rental of motor vehicles.

Retail Sales Tax Division Rule 73 provides as follows:

> "The receipts or proceeds derived from the lease, rental or license to use tangible personal property are subject to the Maryland sales and use taxes * * *".
>
> "In order to constitute a taxable transaction, possession of the property must be transferred to the lessee * * *".

It is a general rule that the construction given a statute by an administrative agency charged with its enforcement, is entitled to great weight and where such administrative agency has adopted rules and regulations defining certain transactions as coming within the scope of a sales tax statute and the legislature subsequently re-enacts the statute without amendment in this regard, the re-enactment amounts to a legislative confirmation of the prior existing rules of interpretation, this assumed legislative approval is rebuttable and may be overcome by consideration of all the circumstances. 47 Am. Jur. Sales and Use Taxes, Section 14. In the instant case the Retail Sales Tax Division has consistently held that rentals of tangible personal property are subject to the tax. The legislature has enacted and re-enacted many sections of the Sales Tax Act since this view was first taken by the Retail Sales Tax Division, but the legislature has not seen fit to overrule this interpretation. We must presume, therefore, that the legislature acquiesced in the Retail Sales Tax Division's interpretation of the statute.

Beckworth Machinery v. Matthews, 190 Md. 182, has been cited by the Petitioner. This case says that the transaction itself will be construed as a sale or as a rental according to its terms and the intention of the parties and that what might be normally nominally considered a rental could in fact be a sale. I cannot see, however, how this would have any bearing on whether or not the Retail Sales Tax Act did in fact intend to assess a tax on rentals. In the case of the Alban Tractor Co. v. The State Tax Commission, at 219 Md. 593, the State Tax Commission assessed a prope 'y tax against the Alban Tractor Company based on the lue of tractors and other machinery which the State Tax Commission contended Alban owned, but which were the subject of various hire-purchase agreements or leases. Alban contended the leases were actually sales and therefore, the property did not belong to them and should not be taxable to them. The Court agreed with Alban, stating that the Alban Tractor Company merely had a security title, the leases in effect were sales, consequently, they should not be taxable to Alban as their property.

The Court in this case recognized that there may be conditional sales that are treated nominally by the parties as leases, but that actually the true owner is the so-called lessee. In such cases the seller or nominal lessor merely retains a security title. At Page 598 the court reviews the evidence which it considers in determining whether or not this is in reality a sale or a lease, "Despite the fact that a sales tax *had not at that time been extended to rentals*, the amount of the sales tax due on the 'leased' property was charged as a part of the entire purchase price to the lessee and the sales tax due thereon was paid to the State as was the case with cash and conditional sales". (Emphasis supplied.) It is interesting to note that one of the criteria that the court uses in making its determination is the fact that the sales tax was paid even although "a sales tax had not at that time (1955-1956) been extended to rentals".

If we look at the Use Tax Act, Sections 372 et seq. of Article 81, we find that the legislature has assessed a tax on the use of items which are purchased within or out the State upon which the sales tax had not been paid. The Use Tax Act is concomitant to the Sales Tax Act and they must be read together. The Use Tax Act in defining the word "purchase" includes any acquisition of tangible personal property which was effected by, (1) the transfer conditionally or absolutely of title or possession or both of tangible personal property, and (2) a lease, rental or grant of a license to use, store or to consume tangible personal property. It seems reasonably clear therefore, that a rental without regard to the ultimate vesting of legal title would be subject to the Use Tax; this being so, recognizing that the Use and Sales Taxes are con-comitant to one another, it seems reasonable to assume that it was the intention of the Legislature that the Sales Tax Act should cover the same types of transactions as the Use Tax Act.

I am of the opinion that the Retail Sales Tax Act does in fact assess a tax upon the rental value of tangible personal property without regard to the ultimate vesting of legal title, if possession of such tangible personal property passes to a lessee or purchaser.

The Petitioner raises the question of the constitutionality of the tax, claiming it is in effect a tax on foreign commerce.

The primary cargo handled by the unloading facilities consists of raw metallic ore which originates from points all over the world (T. 39). The other commodity handled consists of oyster shells, none of which originate in Maryland, but come from the Mississippi River area (T. 40). All cargo handled on the pier is incoming, no vessels are loaded out (T. 42). In addition to acting as stevedore in the unloading of vessels Cottman also acts as steamship agent soliciting buyers for the ores (T. 42). Most of the ores unloaded from the ships are delivered by Cottman into railroad cars owned and operated by Railroad (T. 43). These ores are either loaded directly into railroad cars or trucks beneath the cranes or are loaded from the weight station — hopper at the end of the conveyor belt (T. 43). Some oyster shells are discharged directly from the vessels into trucks on the pier, but most are loaded into trucks from the weight station — hopper. The trucks which haul oyster shells are owned and operated by the Oyster Shell Corporation which is unrelated to either Canton, Cottman or the Railroad (T. 46). Those trucks which carry ore from the pier are owned by independent contractors operating for Canton Railroad (T. 46). Some of the ores which are unloaded into railway cars from the vessels are moved onto the shore in close proximity to the end of the pier and there dumped into piles for subsequent reloading by Railroad into its railway cars for further shipment (T. 53, P. Ex. 3, 8, 16 and 56). Railroad owns seven self-propelled railway car cranes (which cranes are the subject Railroad's claim for refund hereinafter considered), which are used to unload the ores from the railroad car onto the ground and to reload the same ores at some subsequent time back into railroad cars for further shipment (T. 54). There was no testimony before the Hearing Examiner as to the final destination of the ores and oyster shells. There was testimony that Railroad conducts all transportation activities from the pier and that Railroad's

lines do not extend beyond the borders of Maryland (T. 97).

The Constitution of the United States provides that:

> "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, * * *".

It is generally accepted as a broad statement of law that a state may not impose taxes directly upon interstate or foreign commerce, but certain taxes, under some conditions even although they may have some incidental effect upon such commerce, will be valid. However, as to the application of this exception in any specific instance, this rule is difficult of application. It is almost impossible to reconcile the many cases applying this principle to the various sales tax statutes. It is generally accepted to be a rule of law that a State Sales Tax Statute involving *goods* shipped to a destination outside of the taxing jurisdiction is void, 51 Am. Jur. Taxation 103.

The Constitution of the United States also provides:

> "No state shall, without the consent of the Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws".

It is well settled that taxation imposed by the states on imported *goods*, whether levied directly on the goods imported or indirectly by burdening the *right to dispose of them* is repugnant the aforegoing provision. This has been interpreted to mean a state may not require a license for the sale of imported goods. Brown v. Maryland, 12 Wheat. (U.S.) 419, 6 Law Ed. 678.

Generally the States are prohibited by the Constitution from imposing any form of taxation which causes a direct and immediate burden on foreign commerce, but state taxation is not invalid merely because such commerce is incidently, remotely or indirectly effected thereby. 51 Am. Jur. Taxation 263.

The fact that property is used or employed in interstate or foreign commerce does not of itself render it immune or exempt from non-discriminatory local taxation. 51 Am. Jur. Taxation, Sec. 206. It has been held that a state *may levy taxes on property* used in interstate or foreign commerce, which property is located in the taxing jurisdiction, where such taxes are determined by reference to the value of the property, that is to say, if the taxes collected are levied with respect to the value of the property taxed, *if they are not imposed because of such use* and they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use for which it is employed. The general rule is that a state cannot impose a tax upon the *business or privilege of engaging in interstate or foreign commerce* and that a state privilege or occupation tax is therefore invalid insofar as the incident there falls directly upon such commerce. However, it has been held that a state excise tax which effects such commerce not directly, but only incidentally and remotely may be entirely valid where it is clear that it is not imposed with some covert purpose with the effect of defeating rights in the commerce clause, thus the fact that a state tax increases the cost of doing business in interstate commerce does not necessarily render it an unconstitutional burden on such commerce.

In the case at hand the state has made no attempt to directly tax interstate or foreign commerce. The thing taxed here is not the crane itself or the goods unloaded by it but is the *rental* of the cranes by a lessor who is a Maryland domiciliary to a lessee who is a Maryland domiciliary; a transaction which is completely within the State of Maryland. As stated in 51 Am. Jur. Taxation 778, a state tax measured by receipts derived from interstate transporation or communication, but imposed upon some other subject is not invalid under the commerce laws. Various state excise taxes have been upheld on the grounds that they represented impositions, which although measured by receipts, earnings or income, were imposed upon the franchise of the taxpayer to do business or upon its property within the state. Here the tax is not upon the

property handled in foreign commerce. It is upon a transaction without relation to commerce, the rental of personal property. The only relationship to foreign commerce is that the tax is based on the rental value of the cranes, which rental value is in turn controlled by the volume of use by the lessee, which use is in the handling of foreign cargo. I do not think the prohibition of the Constitution can be extended back this far to exempt this transaction from taxation.

Joseph v. Carter and Weekes, 330 U.S. 432, has been cited many times as a case standing for the proposition that a state may not tax foreign commerce. As a broad proposition this is true, however, I think that the Joseph v. Carter case is readily distinguished from the situation at hand. In the Joseph v. Carter case New York assessed an income tax on receipts from a stevedoring operation which involved the loading and unloading of freight in foreign and interstate commerce. The taxpayer claimed that this was an invalid tax, being in violation of the Constitution of the United States. At Page 432 of the Opinion the Court states, "Stevedoring we conclude is essentially a part of the commerce transaction and therefore *a tax upon the gross receipts or upon the privilege of conducting the business* of stevedoring in interstate and foreign commerce measured by those gross receipts is invalid". In the instant case the Retail Sales Tax Division has not assessed the tax on the business of stevedoring. The tax is assessed on the business of the rental of cranes which is completely independent of any foreign commerce, nor is the tax in question measured by gross receipts from foreign commerce, but is measured by the rental value of the property as determined by the parties.

The case of Canton v. Rogan, 340 U.S. 511, which was an appeal by the present petitioner to the Supreme Court of the United States of a state franchise tax seems to be on point. This case, which was decided in 1951 affirmed the opinion of the Court of Appeals of Maryland and upheld the tax. As in the instant case Canton attacked the validity of the tax on constitutional issues. In this case the court

held that an article may be an export and immune from the tax long before or long after it reaches the port, but where the tax is on activities connected with the export or import, the range of immunity cannot be so wide. The tax in Canton v. Rogan was not on the articles of export or import, nor was it equivalent to a tax on such articles.

In Canton v. Rogan the court stated that it did not decide whether loading for export or unloading for import was immune from tax by reason of the export-import clause. Considering that the Canton v. Rogan case was decided in 1951 I find some difficulty in reconciling this statement with the Joseph v. Carter case decided in 1947, some four years prior, wherein the court had already held that such loading or unloading was immune. However, for the purposes of the issues involved in the instant case, we need not reconcile these two views since I am of the opinion that the present tax is not assessed against the stevedoring operation.

I am of the opinion that the sales tax on these rental transactions is not contrary to the Constitution of the United States and is a valid exercise of the taxation power of the State of Maryland.

Railroad Company

Railroad Company is the owner of seven self-propelled railway crane cars which it acquired by purchase during the period 1956 to 1959 (P. Ex. 10). Upon the purchase of these cranes Railroad paid sales and use taxes to the Comptroller in the amount of $4,343.20.

Seventy-five per cent of the work time of these cranes consists of handling bulk commodities on and about the pier and for loading and unloading such bulk commodities into or out of railroad cars to and from the ground; eleven per cent of the work time of the cranes is devoted to performing right of way maintenance on Railroad's own property. Twelve per cent of the crane time is rendering crane service to other uses (P. Ex. 9, T. 59). The charges to users for the services rendered at locations other than the ore

piers are based on fixed hourly rates which include operating supervision and all operating personnel who are employees of Railroad. For the purposes of billing, time is calculated from the time the crane leaves Railroad's yard until it returns. The orders for crane service may be received by purchase requisitions executed by the customer or by orders for crane service furnished by Railroad (S. Ex. 7). In all instances the operation of the crane would be completely under the control and supervision of Railroad's employees, they having received instructions from Railroad as to the specific work to be done and the manner and method of accomplishment, prior to the time the work was commenced (T. 58 through 61).

The assessment against Railroad is based on the failure of Railroad to collect and pay over to the State of Maryland, Sales and/or Use Taxes on the use of these cranes by others, the Retail Sales Tax Division claiming such use constitutes a rental of those self-propelled railway cranes.

Railroad bases its objection to this assessment on the grounds that the transactions involving the self-propelled railway cranes are not rentals of personal property, but constitute the performance of a service which is not within the purview of the tax statute. Railroad's claim for refund is predicated upon the position that if these transactions are not the performance of a service, but are as contended by the Retail Sales Tax Division, rentals subject to the tax, it is entitled to a refund of the amount of taxes which were erroneously paid by it at the time it purchased the self-propelled railway cranes.

OPINION — RAILROAD

Sales Tax Rule 73 sets up certain criteria by which the Comptroller has determined what will be considered rentals of tangible personal property and what will be considered as the furnishing of a service. The furnishing of a service (except in specified cases), is not subject to the sales and use tax, but as I have already found, the rental of tangible personal property is subject to the tax. Obviously there is a gray area wherein it is difficult to deter-

mine whether a transaction is the performance of a service or the rental of equipment. Rule 73 provides that transactions wherein equipment is used, and an operator is furnished under a written contract prior to the use of the property, and it is clearly shown that the performance of a specific job is contemplated under the direction of the owner of the equipment, such transaction will not be considered a rental of equipment, but will be considered the furnishing of a service. The theory is that the primary object to be attained by such an agreement or transaction is the furnishing of services, equipment being used as incidental to the accomplishment of this purpose. In the case at hand, Railroad introduced purchase order calling for the rendering of crane services which included the use of equipment and men to accomplish an object or purpose, that is loading or unloading railroad freight cars. In each of these transactions the operation of the equipment and the direction of the operators was exclusively with Railroad. Railroad had agreed with its customers to accomplish a particular result, that is to move a commodity, for example steel, from a particular place, such as a railroad car to the ground.

I find that the transactions involving the use of the self-propelled railway cranes owned by Railroad was not one involving the rental of tangible personal property, but was in fact the rendering of a service, which service is not subject to the retail sales and use tax and therefore Railroad is entitled to an abatement of the assessment of $816.85 heretofore determined by the Retail Sales Tax Division to be due.

There seems to be no question that the self-propelled railway cranes are tangible personal property and therefore subject to the sales and use tax upon their original sale unless an exemption can be found in the statute. Section 325 provides that sales of tangible personal property at retail as defined in the Act shall be subject to the tax; sales at retail by definition of the statute means the sale of any tangible personal property with certain exceptions. One of the exceptions is in the case of the sale of tangible

personal property where the purpose of the buyer is to resell the property. The word re-sell must be interpreted consistent with the definition of the word "sell" as set out in the statute. Since I have already found that the word "sell" as used in the statute includes, by force of definition, "rent", it follows therefore that property which is purchased for the purpose of resale *or rental* will not be subject to the sales or use tax upon its original purchase.

I find that the self-propelled railway cranes were not in fact rented, but were used in the performance of a non-taxable service. I find also that the cranes were not purchased for the purpose of sale (the term sale meaning and including rental) and, therefore, do not come within any statutory exemption or exclusion and that such purchase was subject to the sales and use tax. Railroad's claim for a refund in the amount of $4,343.20 is therefore denied.

Conclusion

The bulk unloading cranes owned by Canton and rented to Cottman are tangible personal property. The rental of tangible personal property is subject to the Maryland Retail Sales Tax. The assessment of the tax against Canton in the instant case is not violative of the Constitution of the United States. The petition of Canton for abatement of the assessment is therefore denied.

The railway cranes owned by Railroad were not rented, but such transaction constituted the rendering of a service, not taxable under the Maryland statute. The petition of Railroad for the abatement of this assessment is therefore granted. The taxes paid by Railroad upon the original purchase of the railway cranes was properly assessed, therefore Railroad's claim for refund of such taxes is denied.

Robert N. Lucke,

Hearing Examiner.

December 20, 1961

APPENDIX B

Statutes Involved

Article 81, Section 324(d):

"(d) 'Sale' and 'selling' mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration *including rental, lease or license to use, or royalty,* by a vendor to a purchaser, or any transaction whereby services subject to tax under Section 325 of this sub-title are rendered for consideration to any purchaser by any vendor. Such consideration may be either in the form of a price in money, rights or property or by exchange or barter, and may be payable immediately, in the future, or by installments. *Nothing in this sub-section shall apply to the renting of textiles, the essential part of which includes the recurring service of laundering or cleaning thereof, nor the renting of machines and equipment used exclusively for agricultural purposes.*" (The italicized language was inserted by Chapter 332 of the Acts of 1955.)

Article 81, Section 325:

"For the privilege(s) of selling certain tangible personal property at retail as defined above and for the privilege of dispensing certain selected services defined as sales at retail by Section 324 (f) of this subtitle, a vendor shall collect from the purchaser a tax at the rate specified in this section on the price of each separate retail sale made in this State on or after the date of this Act. The tax imposed by this section shall be paid by the purchaser and shall be computed subject to the terms and conditions of Section 334 of this sub-title, as follows:"

(for the period June 1, 1955 through December 31, 1958)

"(a) On each sale where the price is from fifty-one cents (51¢) to one dollar ($1.00), both inclusive, two cents (2¢).

"(b) On each fifty cents (50¢) of price or fraction thereof in excess of one dollar ($1.00), one cent (1¢)."

(for the period June 1, 1959 through June 30, 1960):

"(a) On each sale where the price is from fifty-one cents (51¢) to sixty-six cents (66¢), both inclusive, two cents (2¢);

"(b) On each sale where the price is from sixty-seven cents (67¢) to one dollar ($1), both inclusive, three cents (3¢);

"(c) On each sale where the price is in excess of one-dollar ($1), three cents (3¢) on each even dollar plus one cent (1¢) for each thirty-three cents (33¢) or fraction thereof in excess of the even dollar(s).

"The tax shall be due and payable at the rates set forth herein on all sales of taxable property or services delivered to the purchaser on or after the effective date hereof."